7

FILED
AUG 3 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1382

In The

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

PLANNED PARENTHOOD FED. OF AMERICA, INC., *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

Brief of *Amici Curiae* Professor Hadley Arkes and The Claremont Institute Center for Constitutional Jurisprudence In Support of Petitioner

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
Karen Lugo
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amici Curiae

QUESTIONS PRESENTED

1. Whether the Partial-Birth Abortion Ban Act of 2003 is a valid exercise of Congress's authority under the Commerce Clause (either as originally understood or as presently interpreted)?

2. Whether, apart from the Commerce Clause, Congress had the constitutional authority to enact the Partial-Birth Abortion Ban Act of 2003?

3. Whether this Court's enunciation of an abortion right permits it to lay claim to the inherently legislative authority to determine the scope and weight to be given to that right?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. Congress's Commerce Clause Authority to Ban Partial-Birth Abortion. 4

II. The Fourteenth Amendment as a Source of Congressional Authority. 9

III. The Right to Abortion Articulated by this Court Does Not Bar Congress's Efforts to Mark the Limits of the Right or to Protect Other Fundamental Rights. 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Barnes v. *Glen Theatre, Inc.*,
501 U.S. 560 (1991) 6

Chisholm v. *Georgia*,
2 U.S. (2 Dall.) 419 (1793) 17

City of Boerne v. Flores,
521 U.S. 507 (1997) 19

Cohens v. *Virginia*,
19 U.S. (6 Wheat) 264 (1821) 7, 16

Cowley v. *Christensen*,
137 U.S. 86 (1898) 6

Doe v. Bolton,
410 U.S. 179 (1973) 25

Dred Scott v. *Sandford*,
60 U.S. (19 How.) 393 (1856) 20, 24, 29

Gonzales v. *Planned Parenthood*,
435 F.3d 1163 (9th Cir. 2006) 15

Gonzales v. *Raich*,
545 U.S. 1 (2005) 8

Gregg v. *Georgia*,
428 U.S. 153 (1976) 28

Griswold v. *Connecticut*,
381 U.S. 479 (1965) 16

Hamden v. *Rumsfeld*,
1260 S. Ct. 2749 (2006) 28

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803) 18

McCulloch v. *Maryland*,
17 U.S. (4 Wheat.) 316 (1819) 7

Meyer v. *Nebraska*,
262 U.S. 390 (1923) 16

Muskrat v. *United States*,
219 U.S. 346 (1911) 20

National Abortion Federation v. *Ashcroft*,
330 F. Supp. 2d 436 (S.D.N.Y. 2004) 5

National Labor Relations Bd. v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 8

New State Ice Co., v. Liebmann,
285 U.S. 262 (1932) 6

Pierce v. *Society of Sisters*,
268 U.S. 510 (1925) 16

Planned Parenthood v. *Casey*,
505 U.S. 833 (1992) 18, 25

Plyler v. *Doe*,
457 U.S. 202 (1982) 12

Roe v. Wade,
410 U.S. 113 (1973) 25, 26, 30

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 2, 7, 9

Stenberg v. *Carhart*,
530 U.S. 914 (2000) 28

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) 26

Troxel v. *Granville*,
530 U.S. 57 (2000) 16

Union Pacific Railway v. Botsford,
141 U.S. 250 (1891) 29

United States v. *Carolene Products*,
304 U.S. 144, 152 n. 4 (1938) 22

United States v. *Darby*,
312 U.S. 100 (1941) 8

United States v. Lopez,
514 U.S. 549 (1995) 5, 7, 8, 9

United States v. Morrison,
529 U.S. 598 (2000) 2, 7, 8, 9

United States v. *Price*,
383 U.S. 787 (1966) 11

Victoria W. v. *Larpenter*,
369 F.3d 475 (5th Cir. 2004) 29

Washington v. *Glucksberg*,
521 U.S. 702 (1997) 28

Webster v. Reproductive Health Services,
492 U.S. 490 (1989) 26

Wickard v. *Filburn*,
317 U.S. 111 (1942) 8

Wilkerson v. *Utah*,
99 U.S. 130 (1879) 28

Yick Wo v. *Hopkins*,
118 U.S. 356 (1886) 12

STATUTES & CONSTITUTIONAL PROVISIONS

18 Pa.C.S. § 3211 (2005) 11

720 Ill. Comp. Stat. Ann. 510/1 (West 2006) 11

Ariz. Rev. Stat. § 13-3603.01 (2006) 11

Ariz. Rev. Stat. §13-1103 (2006) 11

Cal. Pen. Code § 187 (2006) 11

Declaration of Independence ¶ 2, 1 Stat. 1 (1776) 15

Fla. Stat. Ann. § 782.34 (2006) 11

Ga. Code Ann. § 16-12-144 (2006) 11

La. Rev. Stat. Ann. § 1299.35.0 (West 2006) 11

La. Rev. Stat. Ann. § 14:32.5-32.8 (2006) 11

Mich. Penal Code § 750.322 (2006) 11

Minn. Stat. § 609.2661 (2005) 11

Mo. Rev. Stat. § 1.205 (2006) 11

Mont. Code Ann., § 50-20-108 (2005) 11

Neb. Rev. Stat. § 28-328 (2006) 11

Nev. Rev. Stat. Ann. § 200.210 (2006) 11

Ohio Rev. Code Ann. § 2919.151 (West 2006) 11

Okla. Stat. Ann. tit. 21, § 713 (West 2006) 11

Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 ..... passim

S.D. Codified Laws § 22-17-7 (2006) 11

U.S. Const. Amend. X 5

U.S. Const. Amend. XIV, § 5 16

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause)...passim

U.S. Const. art. I, § 8, cl. 10 21

U.S. Const. art. IV, § 2. 14

Utah Code Ann. § 76-7-301.1(3) (2006).....11

Va. Code Ann. § 18.2-71.1 (2006).....11

Wis. Stat. §940.04 (2006).....11

OTHER AUTHORITIES

Arkes, Hadley, FIRST THINGS (Princeton 1986).....3, 29

Arkes, Hadley, NATURAL RIGHTS & THE RIGHT TO CHOOSE (Cambridge 2002) 3

Black' Law Dictionary 452 (6th ed. 1990) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 395 (1769)) 29

Eastman, John C., *Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?* 28 HARV. J. L. & PUB. POL'Y 713 (2005) 2

Eastman, John C., *Stare Decisis: Conservatism's One-Way Ratchet Problem*, in THE COURTS AND THE CULTURE WARS (Bradley Watson, ed., 2002).....2

FARRAND, MAX, ED., 2 RECORDS OF THE FEDERAL CONVENTION (1911) (1787) 22

GROTIUS, HUGO, DE JURE BELLI AC PACIS, bk. I, ch. I, § XIV (A.C. Campbell, trans., London, 1814).....21

Hill, Jeremiah, Letter to George Thatcher (Jan. 9, 1788), *reprinted in* 5 Documentary History of the Ratification of the Constitution 659 19

Jefferson, Thomas, Letter to William Charles Jarvis (Sept. 28, 1820) *in* 15 The Writings of Thomas Jefferson 276, 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904) 20

KANT, IMMANUEL, GROUNDWORK OF THE METAPHYSIC OF MORALS (H. J. Paton, trans., 1956)..... 23

KENT, JAMES, 1 COMMENTARIES ON AMERICAN LAW (1826)..... 21

Lincoln, Abraham, First Inaugural Address—Final Text (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953)..... 20, 21, 25

LOCKE, JOHN, TWO TREATISE OF GOVERNMENT (1690) 23

Locke, John, TWO TREATISES OF GOVERNMENT, Book II, Ch. 2, Sec. 6 (1690) 15

Randolph, A. Raymond, *Address: Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1040 (2006) 27

Rehnquist, William, "The Notion of a Living Constitution," 29 HARV. J.L. & PUB. POL'Y 401, 410 (2006) 24

STORY, JOSEPH, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1158 (1833) 22

THE FEDERALIST NO. 45 (James Madison) (Clinton Rossiter, ed., 1961) 6

THE FEDERALIST No. 47 (James Madison) 20, 24

THE FEDERALIST No. 78 (Alexander Hamilton) 18

THE FEDERALIST NO. 80 (Alexander Hamilton) 16

Thurow, Glen E., *Turning the Tide on Abortion, in* MORAL IDEAS FOR AMERICA (Larry P. Arnn and Douglas A. Jeffrey, eds., 1993) 2

Tucker, St. George, VIEW OF THE CONSTITUTION OF THE UNITED STATES 12 (Liberty Fund 1999) (emphasis added) 15

VATTEL, EMANUAL, THE LAW OF NATIONS OR THE PRINCIPLES OF THE NATURAL LAW, Preliminaries § 6 (1758) 21

WILSON, JAMES, 1 THE WORKS OF JAMES WILSON (Robert Green McCloskey ed., 1967) (1791) 21

Wilson, James, *Of the Natural Rights of Individuals*, in 2 THE WORKS OF JAMES WILSON 597 (1967) (1804) 13

No. 05-1382

In The

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

PLANNED PARENTHOOD FED. OF AMERICA, INC., *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

Brief of *Amici Curiae* Professor Hadley Arkes and
The Claremont Institute Center for Constitutional
Jurisprudence In Support of Petitioner

INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent authority in our national life," including the

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

principle at issue in this case that just governments are established to protect the unalienable rights with which all human beings "are endowed by their Creator," including the right to life. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books, monographs, and articles of particular relevance here, including Glen E. Thurow, *Turning the Tide on Abortion, in* MORAL IDEAS FOR AMERICA (Larry P. Arnn and Douglas A. Jeffrey, eds., 1993); John C. Eastman, *Stare Decisis: Conservatism's One-Way Ratchet Problem*, in THE COURTS AND THE CULTURE WARS (Bradley Watson, ed., 2002); John C. Eastman, *Judicial Review of Unenumerated Rights: Does Marbury's Holding Apply in a Post-Warren Court World?* 28 HARV. J. L. & PUB. POL'Y 713 (2005).

The Claremont Institute Center for Constitutional Jurisprudence has participated as *amicus curiae* before this Court in several cases addressing important constitutional issues, including *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000).

Hadley Arkes, a member of the board of advisors of the Center for Constitutional Jurisprudence, is the Ney Professor of Jurisprudence at Amherst College, where

he has taught since 1966. He was the main architect of the Born-Alive Infants' Protection Act of 2002, and led the testimony for that Act in hearings before the House Judiciary Subcommittee of the Constitution. The Partial-Birth Abortion Ban Act of 2003, at issue here, springs from the same premises and raises the same questions about the constitutional grounds for federal legislation touching on abortion. Professor Arkes's interest is in making a case that does not depend on the Commerce Clause for that national authority.

Professor Arkes is the author of six books, published by the university presses at Princeton and Cambridge. In most of those books, he has dealt with the matter of abortion in its moral and legal dimensions, or he has dealt with the constitutional grounds on which the arguments would finally rest. Among those books are: FIRST THINGS (Princeton 1986); BEYOND THE CONSTITUTION (Princeton 1990); THE RETURN OF GEORGE SUTHERLAND (Princeton 1994); and NATURAL RIGHTS & THE RIGHT TO CHOOSE (Cambridge 2002). In addition, his writings have appeared in law journals, as well as newspapers and journals addressed to a wider audience, and provide the foundation from which the arguments in this brief are drawn.

SUMMARY OF ARGUMENT

Although not addressed by the courts below, it is important to consider, as a threshold matter, whether the Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, is an exercise of powers delegated to Congress by the Constitution. The Act itself appears to rest on the Commerce Clause. In Part I below, we contend that such a claim cannot be sustained as that Clause was

originally understood, but we then note that the Act is easily a valid exercise of Commerce Clause authority as currently viewed by a majority of this Court.

In Part II, we offer another ground for Congress's authority, one which parallels the authority claimed by this Court when it rendered its initial and subsequent abortion decisions. Because it would be incompatible with our constitutional system, which assigns the legislative power to Congress, for the federal courts to have jurisdiction in an arena that is closed to the federal legislature, Congress's authority with respect to abortion must be co-extensive with the authority that has been claimed by this Court over the subject.

Finally, in Part III, we contend that Congress must be given a great deal of deference as it attempts to define, legislatively, the parameters of the right this Court has recognized, and the weight to be given to that right when it comes into conflict with other fundamental rights of at least equal import. Under that standard, and the principles of constitutionalism upon which it is based, the Partial-Birth Abortion Act of 2003 should be upheld.

ARGUMENT

I. Congress's Commerce Clause Authority to Ban Partial-Birth Abortion.

The Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (the "Act") announces in its opening sentence that it forbids any physician "*in or affecting interstate or foreign commerce* [from] knowingly perform[ing] a partial-birth abortion." (Emphasis added). Obviously designed to permit regulation of partial-birth

abortions to the full extent of the power delegated to Congress under the Commerce Clause, the Act's reliance on the Commerce Clause is nevertheless problematic, at least as that Clause was originally understood.

Judge Casey noted in the parallel case out of New York, *National Abortion Federation* v. *Ashcroft*, 330 F. Supp. 2d 436, 440 n.1 (S.D.N.Y. 2004), that no plaintiff in the case before him challenged the authority of Congress to legislate on this matter under the Commerce Clause. And none of the Courts of Appeals that have considered the statute have dealt with the lurking Commerce Clause issue. But it is never out of season for this Court to weigh seriously the constitutional ground offered by Congress for its action—even before turning to consider prohibitions found elsewhere in the text of the Constitution, or limitations even more refined, found outside that text of the Constitution. Such an inquiry is part of a constitutional discipline that puts boundaries or restraints on the reach of the federal authority, and it applies as much to Congress as to the other branches of the national government.

It is well established and recently reaffirmed by this Court that the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the States or to the people. *See e.g., United States* v. *Lopez*, 514 U.S. 549, 552 (1995); U.S. Const. Amend. X. As James Madison explained:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external

> objects...The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

THE FEDERALIST NO. 45, at 292-93 (J. Madison) (Clinton Rossiter, ed., 1961); *see also* The Federalist No. 17, at 118 ("The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desireable cares of a general jurisdiction").

It is equally well settled that chief among the powers reserved to the States is the police power—the power to protect the "safety, health, peace, good order, and morals of the community." *Cowley* v. *Christensen*, 137 U.S. 86, 89 (1898); *see also, e.g.*, *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560, 569 (1991); *New State Ice Co.*, v. *Liebmann*, 285 U.S. 262, 304 (1932). Surely the power to impose restrictions on abortion—particularly the late-term, partial-birth abortions at issue here—falls squarely within this area of police powers reserved to the states rather than delegated to the national government.

To be sure, the power to regulate interstate commerce is one of the powers expressly delegated to the national government, but the original meaning of both "interstate" and "commerce" must be stretched beyond recognition for the statute at issue here to be a valid exercise of that power in all but a few cases where the

statute's prohibition might be brought to bear. Quite simply, the performance of an abortion (as with any medical procedure) is not "commerce" at all, much less "interstate commerce," as those words were originally understood. *See, e.g., Lopez*, 514 U.S., at 586-88 (Thomas, J., concurring).

Moreover, the obvious aim of the statute is not to prohibit the performance of a partial-birth abortion on an interstate railway or along side an interstate highway, or even to prevent interstate travel for the purpose of obtaining an abortion. It is, rather, to prohibit a particularly gruesome form of abortion altogether, not because of its impact on commerce, but because of its moral repugnancy. That is a quintessential exercise of the police power reserved to the states, using economic impact as mere pretext, and as this Court long ago noted, "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal ... to say that such an act was not the law of the land." *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819); *see also Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264 (1821) (noting that Congress had no authority to punish murder or felonies generally, except in areas where it enjoyed plenary powers such as the District of Columbia).

Of course, existing precedent supports a much broader view of the Commerce Clause authority of Congress—more than broad enough to sustain the Act of Congress at issue here. Despite recent attempts by this Court in such cases as *Lopez*, *Morrison*, and *Solid Waste Agency* to restore the older sense of the Com-

merce Clause, those efforts never really confronted the much more expansive view of the Commerce Clause first articulated in such New Deal-era cases as *Wickard* v. *Filburn*, 317 U.S. 111 (1942), *United States* v. *Darby*, 312 U.S. 100 (1941), and *National Labor Relations Bd.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and confirmed more recently in *Gonzales* v. *Raich*, 545 U.S. 1 (2005). As a result, Congress has been left with virtually unfettered power to regulate under its Commerce Clause authority. The Partial-Birth Abortion Ban Act of 2003 fits easily on the permissible side of the line this Court has drawn, for several reasons.

First, abortion services, like all medical services, in most instances involve an economic transaction between a woman who seeks the abortion and the physician who is compensated for providing the abortion. The cumulative impact of those economic transactions, when viewed in the aggregate as *Wickard* permits, qualifies as a "substantial effect" on interstate commerce subjecting the abortion procedure to the Commerce Clause regulatory authority of Congress as long as that test remains a part of this Court's Commerce Clause jurisprudence. *But see Lopez*, 514 U.S., at 587-88 (Thomas, J., concurring) (challenging the legitimacy of the substantial effects test); *Morrison*, 529 U.S., at 627 (Thomas, J., concurring) ("the very notion of a "substantial effects"...is inconsistent with the original understanding of Congress' powers and with this Court's early Commerce Clause cases").

Second, the statute does contain a jurisdictional requirement (albeit one that simply parrots the expansive Commerce Clause authority previously recognized by

this Court), thus distinguishing it from such cases as *Lopez*. *See Lopez*, 514 U.S., at 561.

Third, the impact on interstate commerce—even apart from the abortion transaction itself—is much less attenuated than in cases such as *Morrison* and *Solid Waste Agency*. It is a certainty that the nation loses a future economic actor with each abortion, for example. One need not "pile inference upon inference" to discern a large cumulative impact on the national economy from such a practice, therefore, particularly when one considers all the lost diaper sales, school supplies, vacation travel, college tuition, etc., that might otherwise occur but for abortion.

For these reasons and more, the Partial-Birth Abortion Ban Act of 2003 is clearly a valid exercise of Congress's Commerce Clause authority, as currently understood by this Court.[2]

II. The Fourteenth Amendment as a Source of Congressional Authority.

If we should instead to recur to first principles—a task that this issue demands more than most—we will have to look elsewhere for a more certain source of

---

[2] While we think that outcome inconsistent with the original understanding, and while we invite the Court to address the Commerce Clause issue lurking in this case, we ask that any such consideration be done consistently, that existing precedent to the contrary be overturned rather than artificially distinguished. There is already enough of an "abortion distortion" in our law for this Court to deny Commerce Clause authority for the Act at issue here while leaving in place the otherwise expansive interpretation of the clause. *See, e.g.*, *Hill* v. *Colorado*, 530 U.S. 703, 753-65 (2000) (Scalia, J., dissenting).

congressional authority to regulate in this arena of obvious state primacy before proceeding to address whether the Act contravenes certain constitutional or extra-constitutional prohibitions on the legislative power.

Congress is here seeking to protect children at the point of birth, marking the plausible limits that must affect even a right of abortion, taken in its fullest sweep. Congress, by its own assertion, is also seeking to protect the character and integrity of the medical profession by barring surgeons from being lured into surgical procedures that may be regarded as deeply wrong and even corrupting. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 105, § 2(14)(G), 117 Stat. 1201, 1205 ("In addition to promoting maternal health, such a prohibition will draw a bright line that clearly distinguishes abortion and infanticide, that preserves the integrity of the medical profession, and promotes respect for human life"). Those kinds of concerns, bearing on matters of moral consequence, or the protection of persons from injuries suffered at the hands of other, private persons, are concerns that have traditionally fallen within the police powers of the State and local government.

Traditionally, but not exclusively. Under the Civil Rights Acts and the Fourteenth Amendment, for example, the authority of Congress has been flexed to protect people of minority races from assaults at the hands of private thugs of varying degrees of organization. They could be the assembled cohorts of the Ku Klux Klan, members of the lynching party brought forth in an ad hoc way, or private persons in collusion with the authorities. *See, e.g., United States* v. *Price*, 383 U.S. 787

(1966) (applying a federal statute to law enforcement officials who killed three civil rights workers).

The difficulty with the civil rights analogy, though, is that in the context of the Civil Rights Act, Congress was reaching private conduct where states had failed to act (or worse, had acted in collusion with private actors), depriving some persons within their jurisdiction of the equal *protection* of the laws in the truest meaning of that phrase. There is no such state action here. Quite the contrary—many of the states have persisted in their attempts to protect the weakest and most innocent of our fellow human beings despite this Court's series of abortion rulings since 1973.[3]

---

[3] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 510/1 (West 2006) (acknowledging that the unborn is a human from time of conception and entitled to right to life and would be afforded such protection if not for the federal right to abortion); Cal. Pen. Code § 187 (2006); La. Rev. Stat. Ann. § 1299.35.0 (West 2006); Mo. Rev. Stat. § 1.205 (2006); S.D. Codified Laws § 22-17-7 (2006) (finding that "life begins at the time of conception"); Ariz. Rev. Stat. §13-1103 (2006); La. Rev. Stat. Ann. § 14:32.5-32.8 (2006); Mich. Penal Code § 750.322 (2006); Minn. Stat. § 609.2661 (2005); Nev. Rev. Stat. Ann. § 200.210 (2006); Okla. Stat. Ann. tit. 21, § 713 (West 2006); Wis. Stat. §940.04 (2006) (extending criminal law protection to the unborn outside of abortion); Ariz. Rev. Stat. § 13-3603.01 (2006); Fla. Stat. Ann. § 782.34 (2006); Ga. Code Ann. § 16-12-144 (2006); Mont. Code Ann., § 50-20-108 (2005); Neb. Rev. Stat. § 28-328 (2006); Ohio Rev. Code Ann. § 2919.151 (West 2006); Utah Code Ann. § 76-7-301.1(3) (2006) ("It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article 1, Section 1 and 7, Utah Constitution."); Va. Code Ann. § 18.2-71.1 (2006) (criminalizing partial-birth abortion); 18 Pa.C.S. § 3211 (2005) (restricting abortions after the gestational age of the unborn child is 24 weeks or more).

That is not the end of the matter, of course. The distinction between "citizen" (defined as those "*born*" in the United States and subject to its jurisdiction) in the Privileges or Immunities Clause of the Fourteenth Amendment and "person" in the Due Process and Equal Protection clauses certainly lends itself to the credible argument that "persons" conceived but not yet born fall under the umbrella of the latter two clauses. Admittedly, that distinction does not appear to have been within the contemplation of those who drafted or ratified the Constitution, but the lack of attention to the subject was undoubtedly because the practice was so contrary to the most basic of human rights—the inalienable right to life, to use the Declaration's phrase—rather than that the citizens and legislators of the day thought abortion to be acceptable. As a result, we should not presume that the Fourteenth Amendment meant to exclude children in the womb from the class of "persons" protected by the Fourteenth Amendment merely because the subject of abortion was not debated in 1866.

This Court has recognized in other contexts, for example, that the word "persons" encompasses a wider category than the word "citizens." Visitors from abroad, resident aliens, and illegal immigrants alike may be protected from the lawless assault on their lives even without the need to show passports or papers of citizenship, and cannot be deprived of their life or liberty without due process, merely because they are "persons." *See, e.g., Plyler* v. *Doe,* 457 U.S. 202, 211-212 (1982); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886).

In the commonsense understanding, "persons" are human beings. To ask when human beings come under

the protection of the laws is virtually to ask: When do they come to exist? When do their inalienable rights as "persons" attach? The answer given by James Wilson was that basic, fundamental rights are acquired as soon as a person begins to be:

> In the contemplation of law, life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger.

James Wilson, *Of the Natural Rights of Individuals*, in 2 THE WORKS OF JAMES WILSON 597 (1967) (1804). We do not think that Wilson meant merely "quickening" when he noted the point at which infants are first able to "stir in the womb." We assume that he meant "as soon as we know that the child is there, present in the womb and alive." We assume then that his understanding here would readily incorporate the understandings of modern embryology—that a self-organizing life, powering its own development, is present from the first moments, with the zygote that is formed with the union of the male and female gamete. And even without modern embryology, Wilson apparently understood that the organism in the womb does not change species in the course of its development. It does not *become* human, and it is not merely a *potential* human. It is nothing other than human, from its very first moments. That it is "alive" is a matter that needs no special argument: If it were not alive and growing, an abortion would no more be controversial than a tonsillectomy. If the law casts its protection over human persons, the plain import

is that it casts its protection over human beings regardless of their size, their infirmities, their age or their height.[4]

Wilson's views on the subject were formed against a certain backdrop, shared by all of the leading Founders, about the nature of human rights. In his first lecture on jurisprudence at the University of Pennsylvania in 1790, for example, Wilson described that the purpose of the Constitution was not to invent new rights, but to secure those we already had by virtue of our nature as human

---

[4] It has been common, we know, to insist that fetuses, or unborn children in the womb, do not really stand among the "persons" mentioned at different points in the Constitution. They were clearly not the persons "held to Service or Labor in one State, under the Laws thereof, escaping into another." U.S. Const. art. IV, § 2. The more familiar question is whether they may stand among the persons who are protected from any deprivation of "life, liberty, or property, without due process of law" under the Fourteenth Amendment—or under the Fifth. But the importance of the task exists whether we define the unborn child as a "fetus" or as a "person," for in our judgment, the debate over nomenclature has been a long-running ritual in the begging of the question. The whole purpose of assigning this nascent human to the category of fetuses rather than "persons" has been to withdraw the unborn child from the protection of the law. That is a moral judgment of deep consequence, and it cannot be affected by simply offering a change of description or a shift in labels—from a "snark," say, to a "boojum." It no more settles the moral and jural question here than it could have settled the question of slavery by renaming black people as "chattels." Something else needs to be said, something in the domain of substantive argument, to establish why these nascent human beings, these beings who cannot be anything other than human from their earliest moments, can be thrust aside, left outside the circle of other human beings covered by the protection and reach of the laws.

beings. Wilson also took for granted that all of our rights did not spring from positive law. He began, that is, with an understanding of rights that we possessed by nature, even before the formation of different governments, with different ensembles of positive law.

The same principles had been articulated 14 years earlier by Thomas Jefferson in the second paragraph of the Declaration of Independence, when he noted that human beings "are endowed by their Creator with certain unalienable rights" and then proceeded to identify the right to "Life" as first in his list of unalienable rights. In this, he followed John Locke (among others), who found the obligation within the law of nature for all men to deal honestly, to fulfill their promises, and "*not to impair the life*" or "the liberty, health, *limb* or goods of another." John Locke, TWO TREATISES OF GOVERNMENT, Book II, Ch. 2, Sec. 6 (1690) (emphasis added); *cf. Gonzales* v. *Planned Parenthood*, 435 F.3d 1163, 1167 (9th Cir. 2006) (describing the manner in which D & E abortion rips the limbs from a near-born child). The delegates to the Virginia ratifying convention echoed the theme, noting in their statement in ratification of the Constitution "[t]hat there are certain natural rights, of which men, when they form a social compact, cannot deprive or divest their posterity; among which are the *enjoyment of life* and liberty, with the means of acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety." St. George Tucker, VIEW OF THE CONSTITUTION OF THE UNITED STATES 12 (Liberty Fund 1999) (emphasis added).

One of the purposes of the Fourteenth Amendment was to secure such basic, fundamental rights against the

state governments, even if those principles were left somewhat undefined. This Court has repeatedly given voice to the same idea, finding fundamental, though unenumerated, rights in the grand pronouncements of the Fourteenth Amendment. *See, e.g.*, *Troxel* v. *Granville*, 530 U.S. 57 (2000); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923). So unless this Court is willing to rebuke the entire body of its fundamental rights jurisprudence, we must proceed from the premise that the Fourteenth Amendment offers a foundation upon which Congress, via Section 5 of that Amendment, is on thoroughly defensible ground in enforcing fundamental respect for life at its earliest stage.

Even if one rejects the basic premise that the Fourteenth Amendment protects fundamental though unenumerated rights (including rights at issue in the abortion context), or adheres to the view that such rights remain under the realm of state authority unless expressly enumerated in the text of the Amendment, it is clear that this Court has already adopted the opposite view. One thing that is clearly untenable, however, is for the Court to have jurisdiction over a subject matter that is nevertheless closed to Congress under principles of federalism or the related doctrine of enumerated powers.

In *Cohens* v. *Virginia*, Chief Justice Marshall observed that "the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws." 19 U.S. (6 Wheat.), at 384. *See also* THE FEDERALIST NO. 80 (Alexander Hamilton) ("If there are such things as po-

litical axioms, the propriety of the judicial power of a government being coextensive with its legislative, may be ranked among the number"). That is to say, any issue that arises under the Constitution and laws of the United States, any issue arising for the federal government, had to come *presumptively* within the jurisdiction of the federal courts.[5]

The matter is indeed so axiomatic that the attempt to spell out the supporting reasoning may strike modern observers as somewhat quaint. Yet those steps were filled in at the beginning of the American law. James Wilson, in the first days of this Court, invoked Bracton's maxim, *Supervacuum esset leges condere, nisi esset qui leges tueretur*: "It would be superfluous to make laws, unless those laws, when made, were to be enforced." *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 464 (1793). Wilson went on to note that "when the laws are plain, and the application of them is uncontroverted, they are enforced immediately by the Executive authority of Government. When the application of them is doubtful or intricate, the interposition of the judicial authority becomes necessary." *Id.*, at 464-65. For most of

---

[5] That reigning presumption would be dissolved, of course, when there was something in the laws, or in the structure of the Constitution itself, that explicitly withheld that jurisdiction. The appellate power of the Supreme Court is subject to "such Exceptions, and . . . such Regulations as the Congress shall make," for example. U.S. Const. art. II, § 2. And other areas of national power are explicitly and exclusively assigned to one of the coordinate branches of government. *See, e.g.*, *United States* v. *Belmont*, 301 U.S 324 (1937) (refusing to review the decision of the Executive in recognizing the Soviet Union).

us the understanding is so elementary that it no longer needs restating: If there is the authority to legislate, there must be the authority to enforce or administer what has been enacted as law. And if a constitution provides for a separation of powers, with a judicial branch, the authority to judge those laws, independently, as they bear on cases in controversy, or disputes about the meaning of those laws—those cases must come within the reach of the judiciary. *See Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 173-74 (1803); THE FEDERALIST No. 78 (Alexander Hamilton).

But the corollary must also be true: Any issue that comes within the competence of the judicial branch must come, presumptively at least, within the reach of the legislative and executive branches as well. If the Court can articulate new rights under the Constitution—as in a right to abortion—the legislative branch must have the authority to legislate regarding those same rights on precisely the same ground established by the courts as the constitutional ground of those rights.

After meandering through the penumbral emanations of various constitutional provisions, this Court itself seems to have come to rest on the Fourteenth Amendment as the source of the fundamental right to a mother's privacy and bodily autonomy (which, in the Court's view, leads inexorably to the right to abortion) as well as to an unborn child's right to life (at least that of a post-viability unborn child). *See, e.g., Planned Parenthood* v. *Casey*, 505 U.S. 833, 876 (1992). Since the Court has found a right to abortion in the Fourteenth Amendment, then Congress must have the authority to protect and fill out that same right under the Fourteenth

Amendment. Similarly, since the Court has recognized in the Fourteenth Amendment a state's substantial interest in protecting a pre-born's right to life, then Congress must likewise have the authority to protect and fill out that same right, and to adopt legislative solutions to the inevitable conflicts between the two.

While, in the natural law/common law tradition,[6] the recognition of new, unenumerated rights may be part of the judicial prerogative, an unelected judiciary cannot be the sole voice in such matters, at least not if ours is to continue to be a government grounded in the consent of the governed. The scope of new-found unenumerated rights, and the weight to be given them when they come in conflict with other fundamental rights, is more properly a legislative than a judicial function.[7]

---

[6] We equate the common law with the natural law, in accord with the understanding at the time of the founding. See, e.g., Letter from Jeremiah Hill to George Thatcher (Jan. 9, 1788), *reprinted in* 5 Documentary History of the Ratification of the Constitution 659 (describing a Bill of Rights as "no more than a Collection of Sentences from the Common Law, which sprang from the Law of nature, collected and compiled together from the experience of former Ages").

[7] We are not here dealing with a congressional attempt to redefine an explicit textual requirement of the Constitution, *cf. City of Boerne v. Flores*, 521 U.S. 507 (1997). Rather, we are dealing with non-textual requirements of the Constitution, necessarily looking to a higher authority than the actual text has provided as a matter of positive law. It is simply inconceivable to think that the Court has not only the power to invent new rights under this claimed authority, but the exclusive power to define the scope and weight to be given to those rights, even against legislative judgments to the contrary.

Congress, could also fill out legislatively such rights even more fully than a court, for a court would ever be operating within the constraints of cases confined, as they are, to the interests in conflict between two litigants. *See Muskrat* v. *United States*, 219 U.S. 346, 356 (1911). And it must also have the legislative power to define the limits on those rights, and to weigh those rights against others at least as fundamental. The one thing that is untenable, under the logic of this Constitution and the separation of powers, would be for the Court to articulate new rights—and then assign to itself a monopoly of the legislative power in shaping those rights. Such would be "the very definition of tyranny." THE FEDERALIST No. 47 (James Madison). It "would place us under the despotism of an oligarchy." Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820) *in* 15 The Writings of Thomas Jefferson 276, 277 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1904).

Abraham Lincoln, criticizing this Court's decision in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1856), made a similar point in his First Inaugural Address:

> [T]he candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decision of the Supreme Court, . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.

Abraham Lincoln, First Inaugural Address—Final Text (Mar. 4, 1861), *in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

The notion that the legislature would have a hand (indeed, the principal hand) in shaping the scope of newly-discovered unenumerated rights is not new; indeed, it is, in a related context, an explicit part of the Constitution. Article I, Section 8, Clause 10 gives to Congress the power "To define and punish . . . Offences against the Law of Nations." Those who drafted and ratified the Constitution understood the "Law of Nations" to be "the law of nature applied to states and sovereigns, obligatory upon them in the same manner, and for the same reasons, as the law of nature is obligatory upon individuals." JAMES WILSON, 1 THE WORKS OF JAMES WILSON 148-67 (Robert Green McCloskey ed., 1967) (1791); *see also, e.g.,* JAMES KENT, 1 COMMENTARIES ON AMERICAN LAW 1-4 (1826) ("[the] application of the law of nature has been called by Vattel, the necessary law of nations, because nations are bound by the law of nature to observe it"); *cf.* HUGO GROTIUS, DE JURE BELLI AC PACIS, bk. I, ch. I, § XIV (A.C. Campbell, trans., London, 1814) ("scarce any right can be found common to all nations, except the law of nature, which itself too is generally called the law of nations"); EMANUAL VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF THE NATURAL LAW, Preliminaries § 6 (1758) ("the law of Nations is originally no other than the law of Nature applied to Nations").

Some of those laws were of long-standing acceptance, and they were binding upon the United States (just as the laws of nature are binding upon individuals) even apart from positive-law proscriptions. *See, e.g.,*

Kent, at 1-4 ("The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind"). But, out of recognition that our understanding of the immutable principles of the laws of nature and of nations becomes more fully developed over time, the Constitution explicitly assigns the power to "define" offences against the Law of Nations to Congress. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1158 (1833) ("Offences against the law of nations . . . cannot with any accuracy be said to be completely ascertained, and defined in any public code . . . . In respect, therefore, . . . to offences against the law of nations, there is a peculiar fitness in giving to congress the power to define, as well as to punish"); MAX FARRAND, ED., 2 RECORDS OF THE FEDERAL CONVENTION 614-15 (Sept. 14, 1787) (exchange between James Wilson and Gouvernor Morris, in which Morris argues that the power to "define" is necessary because of the vagueness of the Law of Nations).

The analogy to domestic unenumerated rights should be obvious. While it is certainly within the power of the courts to enforce rights explicitly enumerated in the text of a written constitution (and even to do so over the objection of legislative majorities, in order to protect individual and minority rights, *see United States* v. *Carolene Products*, 304 U.S. 144, 152 n. 4 (1938), the authority of the judiciary must necessarily be more circumspect when it ventures to "define" new, unenumerated rights, affording to the legislature (and through it, the sovereign people) a much greater role to play in describing the extent of the right, and even whether the "right" should properly be deemed a right at all! To do

otherwise would be to substitute "the despotism of an oligarchy" for the government by consent of the governed mandated by the principles of the Declaration and given effect by the Constitution.

John Locke, whose influence on the Founders is well-known, pierced to the logical core of the separation of powers when he noted the discipline that would have to bear on legislators:

> [I]n well-ordered commonwealths, where the good of the whole is so considered as it ought, the legislative power is put into the hands of divers persons who, . . . have by themselves, or jointly with others, a power to make laws, which when they have done, being separated again, they are themselves subject to the law they have made; which is a new and near tie upon them to take care that they make them for the public good.

JOHN LOCKE, TWO TREATISE OF GOVERNMENT, Sec. 143 (1690). In this manner, the separation of powers would contain the logic of the Categorical Imperative or what the philosophers would call the "universalizability principle." *See* IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (H. J. Paton, trans., 1956). Legislators would be cautioned that the laws they frame must be placed, for their administration, in hands other than their own, and those could well be the hands of their political adversaries. The legislators had better take care, then, not to legislate for others the kind of measures that they would not readily see enforced against themselves as well.

We do not see how the courts can be exempted from the same logic. Perhaps this Court may articulate new rights, or draw out of the Constitution implications previously unseen; but if it has done that, it cannot control completely what a legislature may do in filling out, in more detail, across a broader range, the constitutional rights that the Court itself has brought to the level of recognition. *See* THE FEDERALIST NO. 47, at 300 (James Madison) (quoting Montesquieu: "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the *judge* would be the *legislator*").

An example of this Court's encroaching into the legislative arena, with disastrous consequences, is illustrated in the infamous *Dred Scott* case. *Scott v. Sandford*, 60 U.S. 393 (1857). The late Chief Justice Rehnquist wrote that the Court disregarded all of Congress's debate and legislation in the Missouri Compromise, the Wilmot Proviso, and the Kansas-Nebraska Act and then asserted "that the [slavery] decision had never been one that Congress was entitled to make, because it was one that the Court alone, in construing the Constitution, was empowered to make." William Rehnquist, "The Notion of a Living Constitution," 29 HARV. J.L. & PUB. POL'Y 401, 410 (2006). In fact, the Court asserted that the right to property in a slave was to be afforded the same protection as all other property rights. *Scott*, 60 U.S., at 452. The Court granted itself a monopoly over shaping this right and as Chief Justice Rehnquist pointed out, under the Court's erroneous view, "Congress was without power to legislate upon the issue of slavery even in a territory governed by it" and was "virtually powerless to check or limit the spread of the insti-

tution of slavery." Rehnquist, 29 HARV. J. L. & PUB. POL'Y, at 410. We must not make the same mistake again. As noted above, Lincoln thankfully refused to allow the question of slavery to "be irrevocably fixed by decision of the Supreme Court," lest the people cease "to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal." Abraham Lincoln, First Inaugural Address (1861). The principle of government by consent of the governed requires no less here.

III. The Right to Abortion Articulated by this Court Does Not Bar Congress's Efforts to Mark the Limits of the Right or to Protect Other Fundamental Rights.

What Congress has done, by enacting the Partial-Birth Abortion Ban Act of 2003, is quite in accord with the authority that the legislative branch may rightly exercise in drawing out more precisely the implications of the rights articulated by the courts. For in filling out those rights, the legislative branch may also mark their limits. In this instance, Congress is positing this judgment: that whatever else a right to abortion encompasses, it could not have been meant to entail a right to destroy a child at the very point of birth, and with methods so patently cruel and painful. Nothing in *Roe v. Wade*, 410 U.S. 113 (1973), or the companion case of *Doe v. Bolton*, 410 U.S. 179 (1973), ever staked out explicitly such a claim. Nor is it apparent that this Court would find such a right entailed by its decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)—a right to perform abortions right up and through the time of birth, on a child partially removed from the birth ca-

nal. Indeed, during re-argument in *Roe v. Wade,* Justice Marshall stated that killing of a child in the process of childbirth "is not an abortion," to which Petitioner (counsel for Jane Roe) responded, "You're correct, sir. It would be homicide." Transcript of Oral Reargument, *Roe* v. *Wade*, 410 U.S. 113 (1973) (available at http://www.oyez.org/oyez/resource/case/334/reargument/transcript) (last visited Aug. 2, 2006).

Nor would it flow, from the previous holdings of the Court, that abortions may not be restricted in their methods. As this Court has recognized, a right to abortion would not be impaired merely because certain restrictions were imposed to safeguard the health of the pregnant woman (e.g., by insisting that the abortions be performed in hospitals or licensed clinics). *See Roe*, 410 U.S., at 163. Nor would that right be impaired if the legislature imposed restraints inspired by a concern for the treatment of the unborn child. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989).[8] Even if Congress had no responsibility of its own to judge the constitutionality of the measures it is enacting—even if it had no standing as a branch of the

---

[8] As Chief Justice Rehnquist observed there, "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability." The Chief Justice would cite in that vein Justices O'Connor and White dissenting in *Thornburgh* v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986). *See id.*, at 795 (White, J., dissenting) ("[T]he State's interest, if compelling after viability, is equally compelling before viability"); *id.*, at 828 (O'Connor, J., dissenting) ("[The] State has compelling interests in ensuring maternal health and in protecting potential human life, and these interests exist throughout pregnancy").

government on a plane of dignity comparable to that of this Court—it would still be reasonable for Congress to put forth this understanding, to propose, in effect, to the Court that this measure is quite consistent with the rights that the Court had articulated in *Roe v. Wade*.

Under the principles articulated above, Congress also has the authority to do more than merely marking the outer limit of the right to abortion. Congress would be on thoroughly defensible ground in acting for the sake of protecting the life within the womb. For that, of course, there is no need to make a finding about the "human" standing of the offspring. Congress has flexed its authority in other instances to protect endangered species and other animals. A Congress that can protect tuna and whales and snail darters is not confined, in its moral concerns, to every vulnerable animal *apart from humans*. As the example of other animals makes abundantly clear, there is no need to qualify as a "person" in order to come with the protection of the laws and the power of Congress. As the late Judge Friendly correctly noted in a pre-*Roe* draft opinion that was never issued when the particular case became moot, even if the legislature is not compelled to "extend to the fetus the same protection against destruction that it does after birth, it would be incongruous...for us to hold that a legislature went beyond constitutional bounds in protecting the fetus." *See* A. Raymond Randolph, *Address: Before Roe v. Wade: Judge Friendly's Draft Abortion Opinion*, 29 HARV. J.L. & PUB. POL'Y 1035, 1040 (2006).

This Court has explored the boundaries of privacy and dignity to find rights previously undescribed. A woman's right to privacy now supplants the potential to

afford a formative human life the same level of dignity now accorded animals and the least deserving among us, from convicted criminals to unlawful combatants. The criminal is protected from torture or an unnecessarily painful execution because, notwithstanding his offense, he is still entitled to a minimum standard of dignity.[9] Death row convicts rate the concern that the methods of execution are administered without any "wanton infliction of pain." *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). This Court has admonished the military to be mindful of the dignity of those considered enemy combatants in the current War on Terror. See *Hamden* v. *Rumsfeld*, 1260 S. Ct. 2749 (2006); *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). We even cloak methods to end life when continuing to live would be painful or complicated as "death with dignity." *See Washington* v. *Glucksberg*, 521 U.S. 702 (1997).

Among the hierarchy of those deserving dignity protections, we must find a place for the innocent and worthy unborn human life, even against claims of privacy. Common law recognized, for example, that the right to privacy had to yield to protect the life and dignity of the unborn. The Writ *de Ventre Inspiciendo* required that a

---

[9] In one case, the Court stated that the acts of beheading or quartering a criminal would constitute cruel and unusual punishment. *Wilkerson* v. *Utah*, 99 U.S. 130, 135 (1879). Under the same reasoning, Congress has every right to protect an unborn child from "the pain associated with piercing his or her skull and sucking out his or her brain," or from having his or her body severed as his limbs are torn off. *See* The Partial-Birth Abortion Ban Act of 2003, § 2(14)(M), 117 Stat. 1201, 1205; *Stenberg* v. *Carhart*, 530 U.S. 914, 958-59 (2000).

woman convicted of a capital crime relinquish her right of privacy and undergo an invasive physical exam to determine if she was pregnant. The unborn child was thus afforded protection apart from the punishment required by the mother's crime. *Union Pacific Railway v. Botsford*, 141 U.S. 250, 253 (1891); Black' Law Dictionary 452 (6th ed. 1990) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 395 (1769)).

While we take great care that "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," are encompassed in adhering to the Eighth Amendment protections against cruel and unusual punishment, *Victoria W.* v. *Larpenter*, 369 F.3d 475, 483 (5th Cir. 2004), there must be an effort within these vaunted concepts of dignity, humanity, and decency to protect an innocent, unborn child from the barbarism of a late-term abortion.

It should be noted that Congress has not here claimed the authority to overturn any judgment rendered in a case by the courts. But for the reasons set out above, Congress commands ample authority to frame general policies in the field engaged by the Court, and to reach judgments not entirely identical to the judgments that the Court might reach. The Court declared in *Dred Scott* that blacks could not be citizens of the United States. But to say that Dred Scott was not a citizen did not bar the Congress, or the President, from respecting the citizenship of other black people in other domains. *See* HADLEY ARKES, FIRST THINGS 419-21 (1986) (discussing the Lincoln Administration's respect of the claim of blacks to be regarded as citizens, to carry pass-

ports of the United States abroad, and to hold patents under the laws of the United States).

Nor is there any need to overturn the decision in *Roe v. Wade* in order to sustain that Act at issue here, and Congress has not risen to that level of confrontation in this instance. Congress has offered what might be seen as the gentlest act in countering the sweep of the "abortion liberty." It has sought to find the most evident, plausible limit to that right to abortion, a limit that has commanded the assent of the broad public. And now, in effect, Congress proposes that limit to the courts, with a reasonable hope to command the assent of our jurists as well. Our own judgment, deepened by our own hope, is that this Court will accept this gentle offer to enter into a conversation on the contours of the right to abortion it has unilaterally recognized. And our plea then is to sustain this measure, so carefully considered and passed in three Congresses.

CONCLUSION

The decision of the Ninth Circuit should be reversed, and the Partial-Birth Abortion Ban Act of 2003 upheld.

Respectfully submitted,

Edwin Meese III
214 Massachusetts Ave. N.E.
Washington D.C. 20002

John C. Eastman
Counsel of Record
Karen Lugo
The Claremont Institute Center
for Constitutional Jurisprudence
c/o Chapman Univ. School of Law
One University Dr.
Orange, CA 92866
(714) 628-2500

Counsel for Amici Curiae